



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

[CONSTITUTIONAL & HUMAN RIGHTS DIVISION]

PETITION NO.124 OF 2017

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 10, 22, 23, 33(1)(a), 35(1)(b), 258 AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

IN THE MATTER OF THE CONTRAVENTION OF ARTICLE 19 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR) OF 1948, ARTICLE 19 (2) OF THE INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS (ICCPR) AND ARTICLE 9 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS (THE BANJUL CHARTER) ALL OF WHICH ARE NOW PART OF KENYAN LAW BY VIRTUE OF ARTICLE 2(6) OF THE CONSTITUTION

IN THE MATTER OF SECTION 4(1) (a) AND 4(3) OF THE ACCESS TO INFORMATION ACT NO. 31 OF 2016

AND

IN THE MATTER OF: THE PETITION BY JOHN GACHANGA AND DONALD KIBORO MWAURA SEEKING TO ENFORCE THEIR FUNDAMENTAL RIGHT TO INFORMATION UNDER THE CONSTITUTION OF KENYA, 2010

BETWEEN

1. JOHN GACHANGA

2. DONALD KIBORO MWAURA.....PETITIONERS

AND

COMPETITION AUTHORITY OF KENYA.....RESPONDENT

JUDGMENT

1. The Petitioners herein, who describe themselves as mature male adults of sound minds and are citizens of the Republic of Kenya filed this petition against the respondent herein, a statutory body established under the Competition Act, No. 12 of 2010 (hereinafter "**the Act**") in their capacities as Directors in a Private Company known as Savannah Cement Limited (hereinafter "**the Company**") seeking the following orders:

a) A declaration that the Petitioners' fundamental rights and freedoms as enshrined under Articles 33 (1) (a) and 35 (1) (b) of the Constitution of Kenya 2010, have been contravened and infringed upon by the Respondent by its refusal to give the Petitioners the information they requested by supplying or sharing with the Petitioners; all the documents submitted to the Respondent by Savannah Cement Limited and all the other parties with respect to the purchase of 60% of the shares in the Company by Seruji Limited.

b) A mandatory injunction compelling the Respondent to release to the Petitioners all the documents including Board minutes and Resolutions, EFT Transfers of the evidence of payment of the purchase price of the shares, contracts, emails, letters, reports, proposals submitted to it by Savannah Cement Limited and all the other parties who participated in the purchase of 60% of the shares in the Company by Seruji Limited.

c) A declaration that the Petitioners are entitled to the payment of damages and compensation for the violation and contravention of their fundamental human rights by the Respondent herein as provided for under Articles 33 (1) (a), and 35 (1) (b) of the Constitution of Kenya, 2010;

d) General damages, exemplary damages and aggravated damages under Article 23(3) of the constitution of Kenya 2010 for the

unconstitutional conduct of the Respondent;

e) Costs of the Petition.

2. The petitioners state that that the Respondent is charged with the mandate of enforcing the Act by *inter alia* receiving and investigating complaints from legal or natural persons and consumer bodies so as to enhance the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing misleading market conduct throughout Kenya.

3. The petitioners' case is that at all material times prior to 17th December 2014, the Company was comprised of a total of 8 directors and 3 shareholders as follows;

<u>Shareholders</u>	<u>No. of Shares</u>
i. Wanho International Limited (Wanho)	3,000 shares (40%)
ii. Savannah Heights Limited (Savannah Heights)	3,000 shares (40%)
iii. ACME Wanji Investment Limited (ACME) (Acme)	1,500 shares (20%)

<u>Directors</u>	<u>Nominated to the Board by:</u>
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i. John Gachanga	Savannah Heights
ii. Donald Kiboro Mwaura	Savannah Heights
iii. Benson Sande Ndeta	Savannah Heights
iv. Chen Song Liu	Wanho
v. Li Jincheng	Wanho
vi. Yu Yanping	Wanho
vii. Liu Zhiyong	Acme
viii. Liu Zhiguo	Acme

4. The petitioners claim that the shareholders of the Company had a Shareholders Agreement dated 27th July 2010 which provided, at Clause 12, for an extensive procedure that was to be followed if any party thereto wanted to sell or transfer its shares but that in complete breach of the provisions of the said Shareholders Agreement, Wanho and Acme secretly and unlawfully sold their shares to a Mauritian company known as Seruji Limited (**Seruji**) for USD 25,000,000.00 through a Share Purchase Agreement dated 22nd September 2014 (hereinafter "**the SPA**"). The Petitioners contend that they were completely unaware that the said sale despite being directors in the Company. They further contend that the SPA also required that they be made aware of the said sale by virtue of being directors in the said Company.

5. They further state that on 16th December 2014, the Company held a Board Meeting wherein they learnt, for the first time, that the shares of Wanho and Acme had already been sold to a third party and further that it later turned out that the Chairman of the board of the Company, one Benson Sande Ndeta (**Benson**) was, in fact, also a director in Seruji which had allegedly purchased the shares. They further claim that all efforts to have the issue of the sale of the shares to Seruji discussed with Benson so as to resolve the outstanding issues were unsuccessful thereby prompting them to file **HCCC NO. 170 of 2016** (hereinafter "**the Suit**") against *inter alia*, Seruji, Wanho and Acme, together with an application under certificate of urgency seeking *inter alia*, an injunction to stop the Company from holding an Extra Ordinary General Meeting which had been slated to take place on 14th May 2016 to appoint the nominees of Seruji to the Board of the Company. They confirm that in the said application, they also sought an order to have the dispute relating to legality or validity of the shareholding of Seruji in the Company referred to arbitration.

6. The petitioners contend that that the sale of the shares was not done in compliance with the provisions of the SPA and contravened the provisions of **Section 42(4)** of the Act which stipulates that a maximum deposit of 20% of the Purchase price of the shares under sale is permitted to be paid by an acquiring entity of the shares of a company prior to approval being given by the Competition Authority (**the Respondent**) which approval was given on **11th December 2014**. On the strength of the above statutory provision, the Petitioners state that their advocates on record lodged a formal complaint with the Respondent on **14th June 2016** calling for its investigation into the matter.

7. The petitioners claim that after exchanging numerous letters with the respondent over the matter, the Respondent informed them that the investigations did not reveal any contravention or breach of Section 42(4) of the Act in the manner the consideration for the shares was paid but that the Respondent declined to supply the documents that the petitioners had requested for thereby precipitating the filing of this petition in which they, *inter alia*, seek an order to compel the respondent to supply them with the information sought in the prayers herein towards fulfillment and implementation of the Petitioners' right to information under the Constitution so as to enable them protect the following rights under the Constitution;

i. The right to a fair hearing under Article 50(1) of the Constitution once the dispute as to whether Seruji lawfully acquired shares in the Company is referred to arbitration; or if it is to be determined in Court, at the time the Court is considering the issues and analyzing the evidence.

ii. The rights to a fair trial specially, the right to adduce and challenge evidence under Article 50(2) (k) of the Constitution.

iii. The right to be supplied with information in a language that they understand under Article 50(3) of the Constitution.

iv. The right to safeguard their property, (specifically their shares in the Company) under Article 40 of the Constitution.

8. It is the petitioners' further claim that the Respondent's refusal to supply them with the information sought amounts to a contravention of its Constitutional mandate pursuant to **Article 10(1)(a)** as read with **Article 10(2)(c)** of the Constitution which requires the Respondent to foster good governance, integrity, transparency and accountability whenever it's interpreting, or as is the case herein; applying the provisions of the Act especially when legitimate concerns of illegality and fraud have been raised in the manner the alleged transfer of shares was done.

9. At the hearing of the application, Mr. Wandati, learned counsel for the petitioner submitted that even though the information requested for by the petitioners would naturally be expected to be in their possession as directors of the Company, they have been deprived of the said information by the management of the Company thereby leaving them with no choice but to file the instant petition. Counsel argued that the information sought cannot be said to be confidential to the directors of the Company since it is available to other directors.

10. Counsel submitted that the information is required by the petitioners to enable them enforce their right to fair hearing in HCCC No. 170 of 2016 wherein the minority shareholder has sued the Company and other parties.

The Respondent's case

11. The respondent opposed the application through the replying affidavit of its Director General, **WANG'OMBE KARIUKI**, who avers that on 13th October, 2014 the Authority received a merger notification for the proposed acquisition of 60% shareholding of Savannah Cement Limited by Seruji Limited from both Savannah Cement Limited and Seruji Limited. He states that due to the sensitive nature of the information submitted to the Authority, the parties sought and were granted confidentiality to the information filed pursuant to the Merger Notification form on 16th October, 2014 and further, that the respondent analyzed the application in accordance with the provisions of section 46 of the Act and approved the transaction since it neither had any negative effect to competition nor raised any public interest concerns after which the proposed transaction was then gazetted for purposes of notifying the public and in accordance with section 46 (6) (a) (ii) of the Competition Act.

12. He states that on 20th May, 2016 the Authority received a letter dated 19th May, 2016 from the firm of Kisilu & Co Advocates for Savannah Heights Limited informing it that Savannah Heights Limited owned 40% of the shares of Savannah Cement Limited and had three directors on the Board of Savannah Cement Limited while the remaining 60% were owned by Wanho International Limited and Acme Wanji Investments Limited. He further states that the said letter further indicated that Savannah Heights Limited were unaware of the acquisition of the shares of Wanho and Acme in Savannah Cement Limited by Seruji Limited and requested for all the documents the Authority was relying on in approving the transaction but that the respondent informed Savannah Heights Limited that it was constrained by the provisions of section 20 of the Act as the information sought does not fall within the exceptions provided for by section 20 (8) of the Act.

13. He further avers that on 14th June, 2016, the petitioners herein filed a complaint indicating that the acquisition of 60% of Savannah Cement Limited by Seruji Limited was in contravention of section 42(4) and 47 and requested the respondent to invoke the remedies provided for in the Act including revocation of the Merger but that upon conducting investigations, the respondent dismissed the complaint upon finding that it had no basis.

14. On the claim that the merger needed to be revoked for contravening section of 47(1) (a) of the Act on the basis that its approval was founded on misleading or materially incorrect information, the respondent's deponent states that the respondent learnt that the said merger was the subject of another suit being **Nairobi HC Comm. No.170 of 2016 Savannah Heights Limited & 3 others Versus Savannah Cement Limited and 10 Others**. It was therefore the respondent's position that it could in the circumstances only proceed with the investigations on the merger after the High Court's determination on whether the information used to obtain the respondent's approval was materially incorrect or misleading.

15. He reiterates that the respondent is prohibited from disclosing confidential information, where it has granted confidentiality, as provided for in Section 20 of the Act and contends that the Petitioners have been on a fishing expedition by seeking documents from the Authority which documents are within their reach in their capacities as directors of the Company who are charged with the management of all affairs of the Company.

16. At the hearing of the petition, Mr. Wesonga, learned counsel for the respondent likened the instant petition to the relationship between a husband and a wife where the husband asks the wife what she is cooking when he can simply go into the kitchen to get the information in order to illustrate the point that the petitioners had ways of obtaining the information sought from the company in which they are directors. Counsel argued that the merger agreement was protected by confidentiality and that the petitioner had the option of issuing a notice to produce the documents in HCCC No. 170 of 2016 which option they did not exhaust before approaching this court. Counsel argued that the right to information is not absolute and can under Article 24 of the Constitution be limited and further, that section 6 of the Access to Information Act limits disclosure of information where the commercial interests of a third party will be prejudiced which section accords with the provisions of section 20 of Competition Act which outlines the circumstances when information sought can be declined.

17. Counsel maintained the instant petition is not for public benefit but is a purely private affair between the petitioners as directors of the 3 companies and also members of the company boards who participate in all the meetings and resolutions and that under the Companies Act,

the petitioners can approach the registrar of companies in order to obtain the minutes and the resolutions of the Company. It was submitted that the petitioners had not demonstrated that they obtained the authority of the Company to pursue this case.

The interested party's case

18. The interested party herein, Seruji Limited, filed grounds of opposition to the petition in which it listed the following grounds:

- i) The matters being dealt with in this Petition are sub judice and as such are the subject matter of proceedings pending before another court in HCCC. No 170 of 2016.*
- ii) The Court in this instance lacks jurisdiction to rule on the matter at hand, being superseded in precedence by the Commission on Administrative Justice under section 14 of the Access to Information Act 2016.*
- iii) The Petitioners have no locus standi to launch this petition as the Right to Information under Articles 33(1) (a) 35(1) (b) of the Constitution would only be available to the Petitioners if they were seeking to enforce a Constitutional right.*
- iv) The contention that the Petitioners herein require the said information to enforce the right to property has no basis as the subject matter of the suit is shares in which the Petitioners have no ownership, but rather a pre-emption right, which they have already exercised.*
- v) The Interested Party right to privacy and in particular to protection of the confidentiality of his commercial interest and protection of personal information must be borne in mind. The right to information is a qualified right, and giving the Petitioners the information they are seeking would be an outright infringement of the said rights.*
- vi) That in any event the information being sought by the Petitioners is too wide in scope. The Petitioners have asked for too many documents to consider this a reasonable request, while not showing how these documents will help them enforce their constitutional rights. The Interested Party herein cannot help but believe that the Petitioners are simply on a "fishing expedition" in which they seek to establish a case from documentation that they should not be furnished with.*
- vii) The Petition in question is frivolous and lacks merit, and as such it should be dismissed with costs.*

19. At the hearing of the petition, Miss Lubano, learned counsel for the interested party submitted that the petitioners are not directors in the interested party company and cannot therefore seek confidential information submitted in respect of merger in a company in which they have no interest. Counsel added that the petitioners have alternative remedy under Order 11 of the Civil Procedure Rules to request for production of documents or under section 14 of Access to Information Act which requires parties to approach the Commission on Administration of justice in order to access the information sought. For this argument, counsel cited the decision in the case of **Speaker of National Assembly vs James Njenga Karume [2008] 1 KLR 426** wherein it was held that where there is a clear procedure, it should be strictly followed.

20. It was the interested party's case that the doctrine of constitutional avoidance was applicable in this case considering that the proceedings in HCCC No. 170 of 2016 over the same subject matter was still pending determination. It was submitted that the petitioners herein are engaged in a fishing expedition since they are not asking to be furnished with specific documents as the prayers contained in the petition are couched in general terms and do not show how the information will enable the petitioners enforce the right to fair hearing.

21. On confidentiality of information, counsel cited section 2 of Access to Information Act which defines financial information as confidential in nature.

Determination

22. I have considered the pleadings filed herein, the submissions made by counsel together with the law and the authorities that they cited. The main issue for determination is whether the petitioners have made out a case for the granting of the orders sought in the petition. The petitioners' case is that by refusing to furnish the petitioners with the documents that they had requested for, the respondent violated their fundamental rights and freedoms under Articles 33 (1) (a) and 35 (1) (b) and that they are therefore entitled to the orders sought in this petition.

23. Article 33 (1) (a) provides that ***'Every person has the right to freedom of expression, which includes- Freedom to seek, receive or impart information or ideas;'*** While Article 35 (1) (b) states that ***'Every citizen has the right of access to- (b) information held by another person and required for the exercise or protection of any fundamental right or freedom.'***

24. On the right to access information, I note that for purposes of actualizing Article 35, Parliament enacted Access to Information Act 2016 (hereinafter **"the Act"**). Section 4 of the said Act provides for the procedure to access information. The section stipulates;

1) ***"Subject to this Act and any other written law, every citizen has the right of access to information held by—***

a) the State; and

b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.

2) *Subject to this Act, every citizen's right to access information is not affected by—*

a) any reason the person gives for seeking access; or

b) the public entity's belief as to what are the person's reasons for seeking access.

3) *Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.*

4) *This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.*

5) *Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information. (emphasis)*

25. Section 5 of the Act provides that a public entity should facilitate access to information held by it. Under section 8, a citizen who wants to access information should do so in writing with sufficient details and particulars to enable the public officer understand what information is being requested. The Act is also sufficiently clear that the information should be given without delay and at no fee, notwithstanding the reason why the citizen wants to access the information. Section 9 states that a decision on the request to access information should be made and communicated within 21 days. The communication should include whether the public entity has the information and whether it will provide access to the information.

26. On the above basis, the right to access information is inviolable because it is neither granted nor grantable by the state. This is a right granted and guaranteed by the Constitution and is protected by the same Constitution. In the case of *Nairobi Law Monthly v Kenya electricity Generating Company & 2 Others* (supra) the Court stated of what the state should bear in mind when considering the request to access information.;

“34. The...consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest-this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to ‘publish and publicise any important information affecting the nation’, but also to provide open access to such specific information as people may require from the State...

36. The recognized international standards or principles on freedom of information,... include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that ‘Information’ should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information.”

27. The Court then went on to state at paragraph 56;

“[56]... State organs or public entities ... have a constitutional obligation to provide information to citizens as of right under the provisions of Article 35(1) (a)... they cannot escape the constitutional requirement that [they provide access to such information as they hold to citizens.”

28. In the case of *Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission* [2016]eKLR, the Court reaffirmed the position that the Constitution does not limit the right to access information when it stated;

*“[270] Article 35(1) (a) of the Constitution does not seem to impose any conditions precedent to the disclosure of information by the state. I therefore agree with the position encapsulated in *The Public’s Right to Know: Principles on Freedom of Information Legislation* –Article 19 at page 2 that the principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances and that public bodies have an obligation to disclose information and every member of the public has corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information”.*

29. The importance of the right to access information as a founding value of constitutional democracy was dealt with by the Constitutional Court of South African in the case of *President of Republic of South Africa v M & G Media* (supra) where the Court stated that:-

“[10]. The constitutional guarantee of the right of access to information held by the state gives effect to “accountability, responsiveness and openness” as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.”

30. The right to access information as a basis for accountability, responsiveness and openness was emphasized in the case of *Brummer v Minister for Social Development & Others* (supra) where the Court stated ;

“[62] The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency “must be fostered by providing the public with timely, accessible and accurate information.”

[63] Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.”

31. It is now trite law that in order to enforce this right, a citizen claiming a right to access information must not only show that the information is held by the person from whom it is claimed but the citizen must go further and show that the information sought is required for the exercise or protection of another right. In the instant case, it is not disputed that the petitioners complied with the above stated provisions of Access to Information Act in seeking information from the respondent. The petitioners’ case was that they required the information in order to their right to adduce evidence and to challenge the acquisition of 60% shareholding of Savannah Cement Limited by the Interested Party herein. They maintained that the right is encompassed in their right to a fair hearing enshrined under Article 50 of the Constitution; which right is to be exercised at the impending Arbitration between the shareholders of Savannah Cement Limited in which the 60% shares acquisition is being challenged.

32. At the hearing of the petition, Petitioners’ counsel submitted that the information is required by the petitioners to enable them enforce their right to fair hearing in HCCC No. 170 of 2016 wherein the minority shareholder has sued the Company and other parties. In other words the petitioners filed the instant petition in order to obtain documents that they intend to use as exhibits in the civil case.

33. The above scenario brings me to the argument raised by the respondents regarding the doctrine of constitutional avoidance and whether the petitioners could have used any other means, such as the filing of a notice to produce documents in the said civil suit in order to secure the information sought instead of filing this petition. The respondents, on the other hand, argued that the instant petition seeks the enforcement of a purely private affair between the petitioners as directors of the 3 companies. The respondent argued that as directors of the Company and members of the Company’s board who participate in all the meetings and resolutions, the petitioners can approach the registrar of companies in order to obtain the minutes and the resolutions of the Company. The respondents and the Interested Party argued that this court lacks jurisdiction to entertain the petition as it seeks to enforce private contractual rights between the directors of the same company. The respondent and the Interested Party further argued that the information sought by the petitioners is confidential information which they cannot disclose by dint of the provisions of Article 24 of the Constitution and sections 2 and 6 of the Act.

34. The question that this court has to grapple with is therefore whether the doctrine of constitutional avoidance is applicable in the circumstances of this case. When faced with a similar question, **Nyamu, J.** (as he then was) in the case of **Muiruri vs. Credit Bank Ltd & Another** Nairobi HCMCS No. 1382 of 2003 [2006] 1 KLR 385 was of the view that:

“A constitutional issue ... is that which directly arises from court’s interpretation of the Constitution.”

35. Similarly, in the case of **Maggie Mwauki Mtalaki vs. Housing Finance Company of Kenya** [2015] eKLR the court held:

“52. The test whether a Petition raises a constitutional issue, and adopted by Tuiyott J in FOUR FARMS LIMITED vs. AGRICULTURAL FINANCE CORPORATION [2014] e KLR following the decision in DAMIAN BELFONTE vs THE ATTORNEY GENERAL of TRINIDAD AND TOBAGO where it was stated inter....

... where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court’s process.”

36. The above principle was also adopted in **John Harun Mwau Vs. Peter Gastrow & 3 Others** [2014] eKLR where the court stated:-

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights.

... It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”

37. Courts have held the view that the Constitution is not to be invoked unless the constitutionality is itself in question. This was the position adopted in the case of **Leonard Jefwa Kalama And Another Vs. Consolidated Bank Of Kenya Ltd. And 3 Others** [2014] eKLR, the court said:-

“unless it can be shown that the law itself is against the Constitution, the sale of charged property in accordance with due process of that law cannot be held to be unconstitutional deprivation of property within Article 40 of the constitution, this is because the constitution has as one of its principles of governance and national values under Article 10, the doctrine of the rule of law.”

38. The Supreme Court did also adopt the Principle of Constitutional Avoidance in the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others** [2014] eKLR in the following terms:

“[256]...The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court, Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is, the course which should be followed.”

[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).”

39. In the instant case, the petitioners’ main prayer is to be supplied with the documents submitted with respect to the purchase of 60% of shares in the Company by Seruji Limited. It is however instructive to note that even though the petitioners seek prayers that involve the release of documents relating to transactions made between the Company, which is a private entity, and other parties, the said Company was not included as a party in these proceedings so as to enable them present their position and/or protect their interests. Furthermore, it was not disputed that the petitioners are also directors in the Company, in which case, they are ordinarily expected to be in a position to access the information that they seek through these proceedings without invoking the Constitution. I am therefore unable to find that the petitioners’ rights under Article 35 were violated or that they are entitled to the orders sought in this petition.

40. My finding is that having regard to the fact that there exists a civil case being HCCC No. 170 of 2016, a **remedy is available to the petitioners under the provisions of the Civil Procedure Rules which they could invoke in the said civil case so as to obtain the documents sought in this petition. My further finding is that the right to information under Article 35 of the Constitution is not absolute as it is one of those rights that may be limited in line with the provisions of Article 24 of the Constitution which stipulates as follows:**

24 (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable in an open and democratic society base on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right or fundamental freedom:

(b) the importance of the purpose of the limitation:

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”

41. My understanding of Article 24 (1) is that it is permissive on limitation of rights and fundamental freedoms in that the limitation is permissible on two conditions; first that a right or fundamental freedom in the Bill of Rights should only be limited by a law; and second, to the extent only that the limitation is reasonable and justifiable in an open and democratic society.

42. My take therefore is that even where the right or fundamental freedom has been limited by law, the yardstick for determining reasonableness and justifiability of the limitation is whether such limitation is acceptable in an open and democratic society. In considering the limitation under Article 24(1), the court must bear in mind the fact that there is no superior right and take into consideration factors such as the nature of the right to be limited, the importance and purpose of the limitation, the nature and extent of the limitation and the need to ensure that enjoyment of rights and fundamental freedoms by one individual does not prejudice the rights of others. This calls for balancing of rights under the principle of proportionality because rights have equal value and therefore maintain the equality of rights.

43. The respondent also argued that the information sought by the petitioners is confidential information that it is exempted from disclosing under the provisions of section 2 of the Act and reinforced by section 6 of the Act. Section 2 defines exempt information as follows:

" exempt information " means information that may be withheld by a public entity or private body in accordance with section 6;

Section 6(1) and (5) of the Access to Information Act stipulates that:-

1) Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—

(a) undermine the national security of Kenya;

(b) impede the due process of law;

(c) endanger the safety, health or life of any person;

(d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;

(e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;

(f) cause substantial harm to the ability of the Government to manage the economy of Kenya;

(g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;

(h) damage a public entity's position in any actual or contemplated legal proceedings; or (i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.

(5) A public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means.

44. Having regard to the above cited provisions of the Access to Information Act and having already noted that the Company was not made a party to these proceedings despite the fact that the information sought relates to it and may therefore prejudice its interests unless it is given a hearing coupled with the finding that the right to information is not an absolute right as I have indicated hereinabove, I find that the justice of this case does not favour the issuance of the orders sought in this petition.

45. For the above reasons, and having found that the doctrine of constitutional avoidance is applicable in this case and that this petition therefore fails the test of forum together with the finding that the right to information, in the circumstances of this case, is subject to limitation under Article 24 (1) of the Constitution and, section 2 and 6 of the Act, I find that the instant petition is not merited and I therefore dismiss it with orders that each party shall bear his/its own costs.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 31st day of May 2019

W. A. OKWANY

JUDGE

In the presence of:

Miss Wangare for Wandati for petitioner

Mr. Darr for Luvano for interested party

Court Assistant - Ali